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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 30

THE NATIONAL CITY BANK OF NEW YORK,
Petitioner,

v.

THE REPUBLIC OF CHINA,
Respondent,

and

THE SHANGHAI-NANKING RAILWAY ADMINISTRATION, MOH HAN, as Director of the Shanghai-Nanking Railway Administration, SAU CHEN, as Deputy Director of the Shanghai-Nanking Railway Administration,
Plaintiffs.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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Plaintiffs.

REPLY BRIEF FOR PETITIONER, THE NATIONAL CITY BANK OF NEW YORK, ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Argument of the Respondent Analyzed

The brief for the Respondent is divided into two parts: One part is wholly devoted to arguments why this Court should not make any decision whatever on the issues presented in this case and, by such default, permit the decision of the District Court dismissing the Petitioner's counterclaims to be final (Res. Brief, pp. 1-17). In the second part, arguments presented are on the issues actually involved on this appeal (Res. Brief, pp. 17-42).

That it is the intention of the Respondent to present its case in this Court in this two-fold manner is indicated

clearly by its prayer for relief (Res. Brief, p. 42), as follows: "The writ of certiorari should be dismissed as improvidently granted; or, in the alternative, the order of the Court of Appeals should be affirmed."

This brief of the Petitioner will reply to each of these sets of arguments.

PART I

The writ of certiorari was not improvidently granted.

The Issues Defined

Respondent's first contention is that Petitioner, in opposing Respondent's motion to dismiss its counterclaims, asserted that it had a right to an affirmative judgment, but, after adverse decision on this issue, changed its position in this Court. Petitioner asserts that the issues presented to this Court in its brief and in its petition for writ of certiorari are the same issues argued in the District Court and in the Court of Appeals for the Second Circuit.

These issues, as defined by the Petitioner, may be found in its brief, p. 2, as follows:

> "The question presented is the extent to which a foreign government which institutes an action in the courts of the United States against an American corporation to recover a debt may rely on the doctrine of 'sovereign immunity' to avoid a defense to the action, asserted by way of counterclaim, based on a debt owed by it to the defendant. To take the precise situation which exists in this case: Can a foreign government which has borrowed money from an American bank and is in default on the loan sue the bank for the balance in deposit account and recover a judgment for the entire balance, regardless of its indebtedness to the bank?"

This was the issue which obviously and necessarily was raised when Respondent, by motion, interposed, for the

first time in this case, the plea of sovereign immunity and demanded dismissal of defendant's counterclaims (R. 34).

The Respondent's contention that, in some way, this issue became lost seems to be based upon the three following postulates or assumptions:

1. That Petitioner demanded affirmative relief by its counterclaims (the face amount of each of which is larger than the total amount for which Respondent sues) and argued its right to affirmative relief in the District Court, which decided the motion on that issue. (Res. Brief, pp. 3 (Footnote 4), 5, 6, 15). It has now changed its position.

2. That the Petitioner's efforts to make clear, after the plea of sovereign immunity had been raised, that the counterclaims should be considered as set-offs, and were pleaded to defeat the Respondent's suit against it, should cause the Court to treat them as defenses only, and that the dismissal of an affirmative defense is not a final order (Res. Brief, pp. 3, 4, 5, 6) and therefore not properly before this Court.

3. That Petitioner "conceded" the counterclaims dealt with public or governmental functions and that a sovereign performing governmental functions was entitled to governmental immunity as requested by Respondent (Res. Brief, pp. 3, 10, 13).

Seeking to establish these three propositions, the Respondent finds what it believes to be the residual propositions which remain in this case, and declares that these are the questions which the Court should consider if it considers any. This substitute issue, as framed by Respondent, may be found on page 6 of its brief.

Position in Lower Courts

Petitioner's position before the lower courts has never changed. It was that the plea of sovereign immunity interposed by motion limited the recovery of its counterclaims to the amount of any recovery by Respondent

against it. This is borne out by the facts of the case, the written memoranda filed with the courts, and the decisions of those courts.

This Court cannot know what was in the briefs of the Petitioner presented to the lower courts and, since the Respondent has made allegations outside of the record as to the position of the Petitioner before these courts, it seems proper to reproduce exactly the written statements made by the Petitioner to the District Court setting forth its position. The briefs here referred to are filed in the District Court for the Southern District of New York, file No. C. 66-177.

The Petitioner's brief in opposition to Respondent's (plaintiff's) motion to dismiss its counterclaim states at p. 11:

> "This court and other Federal courts and State courts have granted counterclaims, the recovery on which to the defendant asserting the counterclaim has been to the limit for which offset was possible."

The Petitioner's Point III, on p. 20, was designated "Right to Offset by Reason of its Banker's Lien." The argument contained in this point was specifically mentioned in the decision of the lower court, which stated:

> "An additional argument that the defendant has a right to make its debit by reasons of a banker's lien has no validity in this context."

Such a remark could, of course, have related only to the counterclaims and certainly judicial recognition of the right to assert a banker's lien could not result in an "affirmative" judgment (R. 40).

On January 22, 1953, the Petitioner moved for reargument and for leave to amend the counterclaims. There were several purposes, as set forth in the Notice of Motion (R. 46). Among them was to designate the counterclaims as "set-offs" in order to make it wholly clear that they were limited to any recovery by the Respondent. The

Respondent refers to that motion in a footnote (Res. Brief, p. 4, footnote 5) stating that Petitioner, in its motion for reargument "had attempted once more to sustain the counterclaims demanding affirmative relief" citing the record (pp. 46-49), which is the printed copy of the defendant's motion. On this motion the Petitioner restated its position and in its specification covering this point it said, p. 20:

> "The defendant claims only that its counterclaims should be effective up to the amount of any recovery which this Court shall hereafter find. . . ."

The position of the Petitioner (defendant) in the Court of Appeals remained the same, and continuously throughout its brief Petitioner defined its position. One reference will show conclusively what it was.

> "'Counterclaim' as here used will mean counterclaim as against a sovereign. Appellant concedes such a counterclaim is limited to an amount which could be set off against any recovery by the sovereign and to that extent has no more effect than an equitable defense as against the sovereign's recovery." (Appellant's brief filed in the office of the clerk, Court of Appeals for the Second Circuit, p. 10.)

Also, on p. 30 of that same brief, Petitioner had a subheading "The Counterclaims Are Available as Equitable Set-Offs or 'Banker's Liens'" which indicated clearly the continuity of its argument in the lower court, *supra*.

The opinion of the Court of Appeals took cognizance of the position of the Petitioner on this point for the Court said (R. 67):

> "For the purposes of this appeal we shall consider the counterclaims as if they had been further amended in the manner thus proposed by defendant."

Further on in its opinion the Court of Appeals again referred to "defenses by way of set-off and of counterclaim," (R. 67) and in referring to one of the conclusions of the lower court said:

> "We reach the same result if we regard the counterclaims but as set-offs." (R. pp. 67-68)

The decision of neither the District Court nor the Court of Appeals contains any indication that the counterclaims were dismissed because they were in the usual form of counterclaims demanding affirmative relief. This cannot be an oversight by the courts as both decisions are explicit as to the bases on which the court acted.

Form of the Counterclaims

The Petitioner (defendant) pleaded these claims as "counterclaims" and not as "defenses" because, under Rule 13 of the Federal Rules, it was the only way in which they could be pleaded (Res. Brief, p. 4). It would have been an incomplete and improper pleading if defendant had merely stated that the obligation of the plaintiff to it was equal to or exceeded the plaintiff's claim. Also, it must be remembered that the plea of sovereign immunity had not been raised by the Respondent when the counterclaims were pleaded.

In *Kunglig Jarnvagsstyrelsen* v. *Dexter & Carpenter*, 32 F. 2d 195 (2d Cir. 1929), a case in which this Petitioner had originally been one of the parties, judgment on a counterclaim had been entered against a sovereign entity which had at that time interposed no objection. When, however, one of the defendants, Dexter & Carpenter, which had interposed the counterclaim, attempted to collect the judgment out of the funds of the sovereign, sovereign immunity was immediately claimed. Judge Swan said in that case, at p. 200:

> ". . . the court presumptively has jurisdiction and may proceed unless the sovereign objects."

It is not necessary or even proper for defendant to anticipate that the plea of sovereign immunity will be raised. Unless it is raised, the Court must treat the sovereign as any other litigant. *Ex Parte Republic of Peru*, 318 U. S. 578; *Compania Espanola De Navegacion Maritima, S. A.* v. *The Navemar et al.*, 303 U. S. 68; *Mexico* v. *Hoffman*, 324 U. S. 38.

When the plea of sovereign immunity was raised in this case, the Petitioner recognized that this limited its counterclaims to the amount of Respondent's recovery. Its position has never been otherwise. The full amount of the counterclaims must be before the Court even though the plea of sovereign immunity has been interposed. This has been clearly stated by one court which held (*State of Russia* v. *Bankers Trust Company*, 4 F. Supp. 417, 420, aff'd 83 F. 2d 236):

> "The offset must therefore be allowed, and this involves a determination of the amount of it. Injustice to the defendant would be prevented by merely finding that the offset is sufficient to defeat the plaintiff's recovery, but equity ought not to leave the adjudication incomplete. There should be a determination of the exact amount due to the National City Bank, without, of course, any direction that the plaintiff pay the excess or that it be subject to a judgment for the excess."

The experience of this Petitioner in that very case is ample to justify the form of the counterclaims.

Even if the form of the counterclaims were incorrect, (which Petitioner does not concede) or if Petitioner had in fact asked for affirmative judgment after plea of sovereign immunity (which most definitely it had not), the proper treatment would have been as indicated in the *State of Russia* case, namely, to limit the amount of judgment possible on the counterclaims to any recovery of the plaintiff.

This has more recently been done in the case of *Hungarian Peoples Republic* v. *Cecil Associates*, 118 F. Supp. 954.[1] There a sovereign government had leased an entire building, but left the building before the expiration of the term. It sued the owner of the building to recover a deposit of $9,000 given to the landlord by the government to secure the latter's performance of its obligations under

[1] *Cf. Republic of China* v. *Pang-Tsu Mow*, 105 F. Supp. 411 (D. C. 1952); and *U. S.* v. *Laney*, 96 F. Supp. 482 (S. C. 1951).

the lease. The defendants insisted upon an affirmative judgment even after the plea of sovereign immunity had been interposed by a motion to dismiss. But the court, finding the counterclaims properly interposed, stated, in deciding the plaintiff's motion to dismiss them on the grounds of sovereign immunity, that the sovereign "cannot be heard to plead immunity against the granting to the defendants, by way of set-off, of relief at least to the extent to which the plaintiff seeks affirmative judgment."

There can be no doubt that both the District Court and the Court of Appeals decided the instant case on the understanding that the counterclaims were intended to serve only as set-offs and were limited to the amount of plaintiff's claim.

The Respondent, in effect, argues that, because the counterclaims were framed in accordance with Rule 13 of the Federal Rules and in accordance with decisions in previous cases to which the Petitioner was a party and before the plea of sovereign immunity had been interposed, the Petitioner cannot secure any relief, even that to which it may be entitled. On that theory, if a plaintiff (or a defendant pleading an affirmative counterclaim) has demanded more than the amount to which the Court at the end of the case finds it was entitled, the Court cannot render judgment for the amount found to be due, but must dismiss the whole complaint (or counterclaim) because the pleader has asked too much. There is no such rule in our system of jurisprudence.

The Alleged "Concession" of Petitioner

It remains to say a word about the alleged concession of the Petitioner that the counterclaims dealt with public or governmental functions, and that a sovereign is immune from any such claims. The logical end of this argument would be that no counterclaims in any amount or for any purpose could be pleaded against a sovereign, since every act which a sovereign does is a sovereign act. Petitioner

does not contend that for a sovereign to borrow money in the United States or from American institutions is wrongful, or is outside of the authority of the Government. Its act must be a governmental act or it could not be performed at all. It is true that, from some acts, a sovereign is immune as to any loss or damage which it may cause another. But it does not enjoy immunity for many of its acts, and particularly for those which it commits as an alien within the borders of another friendly country, or when dealing with a corporate entity of that friendly country.

The Respondent also says that the issue here relates to "public funds." This is a mere term. With even greater justice the case can be said to relate to the funds of The National City Bank of New York. The argument, it is believed, is not furthered by these mere characterizations.

Other Irrelevant Matters in Respondent's Brief

Only one other matter in Respondent's brief, extraneous to the main issue before this Court, needs to be dealt with. This relates to the peculiar significance and interpretation which Respondent places on Section 25(b) of the Federal Reserve Act, as amended.

The *ex parte* proceedings under that Act are solely to enable an entity, such as the Respondent government, to make demand for bank accounts through agents, designated at its request by the Department of State. There is no issue whatever concerning the meaning, interpretation or application of 25(b) before this Court.

Reference to Section 25(b) of the Federal Reserve Act, other than the paragraph conferring jurisdiction, was intentionally omitted by the Petitioner because it is completely irrelevant. That section was enacted during the war (1941), as stated at the time, to enable governments and central banks to have use of their own funds in a situation where, by reason of the disruption caused by

the war, the persons authorized to sign on these accounts for the government or central bank had been captured, killed or had disappeared. Payment from the account of any juridical entity to a person not authorized to receive it for the use of that entity naturally is not a discharge to the bank for such payment; and so, quite properly, the law provides that any payments made to these designated agents shall "constitute a complete discharge and release of any liability of such bank for or with respect to such property."

There is nothing in the statute which purports to compel the bank receiving such a certification to make payment. The certificate of the Secretary of State is not a determination of property rights nor can it be, since that would mean that the Secretary of State had assumed judicial functions and, solely on the representation of one interested party, had determined all legal controversies between a foreign government and a domestic bank, leaving the courts only the privilege and the obligation of enforcing such an executive determination.

The suggestion in Respondent's brief (p. 11) that Congress, in enacting such a statute, should enumerate the defenses to such a claim which may be availed of by the bank, does not require comment.

PART II

Replying to respondent's arguments on the issues.

I. Respondent's Point II: "A counterclaim arising from transactions extrinsic to that out of which the primary claim arose is the equivalent of an independent suit against the sovereign which may not be sued without its consent."

First of all it must be absolutely clear that the Republic of China has no jurisdiction within the territory of the United States or power to limit jurisdiction of American courts. Respondent several times (Res. Brief, pp. 17, 28

and 29) implies that only by the consent of the Republic of China, can this Court acquire jurisdiction to consider issues in a suit against the Respondent or even a counterclaim in a suit brought by it. This is not the law. The United States has jurisdiction over everything and everyone within its boundaries, and only under special circumstances will it refrain from exercising that prerogative. Nothing The Republic of China can say or do is controlling upon our courts as to their jurisdiction. As Chief Justice Marshall said:[1]

> "The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restriction."

Furthermore it must be noted that Respondent has been inconsistent in its jurisdictional argument. In the District Court, Respondent asked that the counterclaims be dismissed on the grounds "that the Court lacks jurisdiction thereof." In this Court Respondent admits that the jurisdiction exists (Res. Brief, pp. 27-28) but argues that Respondent itself has somehow destroyed that jurisdiction by its refusal to consent. Either the court has jurisdiction or it has not. And if it has, as previously stated, nothing The Republic of China could do will alter that fact.

Of course The Republic of China might influence the court as to the exercise of jurisdiction. It may ask the court to give validity and substance to its plea of sovereign immunity, as it has done in this case. But there is a vast difference between the *possession* of jurisdiction and its *exercise*. Respondent seems to have confused these concepts. For example, it is noted (Res. Brief, p. 30):

> ". . . The doctrine that a court will not *exercise* jurisdiction over a foreign sovereign existed long

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[1] *Schooner Exchange* v. *McFadden*, 7 Cranch 116, 136.

> before the Federal Rules were promulgated, and by virtue of Rule 82 nothing in the Rules may be relied upon to affect the *exercise* of the Court's jurisdiction." (Emphasis added.)

There is positively no mention in Rule 82 of the extent to which a federal court should exercise its jurisdiction. The Rule states:

> "These rules shall not be construed to extend or limit the jurisdiction of the United States district courts or the venue of actions therein . . ."

In Point II, as throughout the remainder of its brief, Respondent relies heavily upon the Draft Convention of Courts in regard to Foreign States, American Journal of International Law, 32 Vol. 26, Supp., referred to in the Respondent's brief on pages 12, 15, 26, 27, 32, 39 and 40 as the Harvard Draft Convention. The Petitioner agrees that much weight may properly be given to the impersonal, disinterested legal research at our great institutions of learning, even though not binding on this Court.[1]

Respondent argues that the Harvard Draft Convention would not permit a set-off as requested here by the Petitioner; but it is not at all clear that Article 6 of the Draft Convention should be so interpreted, particularly in view of the careful distinction made as to those acts for which a sovereign should or should not enjoy immunity.

Such a work would be more persuasive if it were current. This Draft Convention was promulgated in 1932. The twenty-two years which have elapsed since this code was suggested, were studded with cataclysmic events

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[1] The only Convention on this subject which has had international effect is the Brussels Convention of 1926 which drastically restricted the doctrine of sovereign immunity in admiralty matters. The signatories bound thereby do not include the United States; but the United States has never claimed sovereign immunity as to its own merchant vessels. International Convention for the Unification of Certain Rules Concerning the Immunities of Government Vessels, signed at Brussels, April 10, 1926: Treaty Information Bull. No. 18 at 67 (U. S. Dep't State 1931).

which have changed many concepts in this world, not the least of which is the concept of Government. Fortunately, the great work on research in legal thinking has been continued at Harvard and other institutions of learning. Later studies, because of greater timeliness, should have greater weight. Petitioner will refer but to three: the studies appearing in the Yale Law Journal, June 1954, in the American Journal of International Law (47 Am. J. Int. L. 93) and in the Harvard Law Review (67 Harv. L. Rev. 608, 1953-4). In the first mentioned may be found the following statements, p. 1165:

> "For acts within United States territory, a foreign government should enjoy no greater freedom from suit in United States courts than does the federal government.* If a foreign state chooses to act within the United States, it seems not unfair to require it to abide by American policy as embodied in various statutes restricting immunity. . . ."**

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* "This limitation upon foreign sovereign immunity would represent no startling innovation. One of the early American decisions granting immunity was based upon the idea of assimilating the foreign state to the domestic state. *Long* v. *The Tampico*, 16 Fed. 491, 495 (S. D. N. Y. 1883). And a recent case reemphasized this idea. 'In the absence of statute or treaty, no sound principle of law or of international comity requires that the courts of this country treat a foreign government more favorably as to sovereign immunity than our own Government is treated by the courts.' *The Beaton Park*, 65 F. Supp. 211, 212 (W. D. Wash. 1946). See also *Lauterpacht, supra* note 92, at 226."

** "On the contrary, the unfairness lies in allowing the foreign state to remain above the local law while the domestic state and all its citizens are subject to that law. This principle was recognized in Article 11 of the Harvard Research, 26 Am. J. Int'l. 451 (Supp. 1932), which proposed that: 'A State may be made a respondent in a proceeding in a court of another State when, in the territory of such other State, it engages in an industrial, commercial, financial or other business enterprise in which private persons may there engage . . .' *Id.* at 597. Reform based on the assimilation of the foreign state to the local state seems in the offing. 'Public opinion and practical considerations do not permit too wide a gap between the law, which many regard as increasingly artificial, unjust, and archaic, relating to the immunities of foreign states.' *Lauterpacht, supra* note 92, at 221."

The second study is devoted to an examination of the letter by our own Department of State setting forth the restrictive theory of sovereign immunity. This letter, sometimes referred to as the Tate Letter from the name of the person who signed it, is reproduced in the Petitioner's brief, Appendix B.

At page 32 of its brief Respondent states that it is significant that petitioner has not cited one authoritative decision which has allowed a permissive counterclaim or set-off against a sovereign without its consent thereto. Petitioner might, with equal force, reply that it is even more significant that the Respondent has not cited any decision of this Court which holds that a counterclaim against a friendly foreign sovereign must be limited to the subject matter of the action. Respondent does seem to rely on the case of *Bull* v. *The United States*, 295 U. S. 247 (Res. Brief, p. 23), but that case had nothing to do with the scope of counterclaim or kind or type of counterclaim to be permitted against a sovereign. The *Bull* case involved a recoupment which by definition must arise out of the same transaction as the subject matter of the suit. The holding of that case is in no way authority for restricting the scope of a counterclaim to the limits required in recoupment. In fact, the word "counterclaim" is not even mentioned in the case. This is fully discussed in Petitioner's Brief on page 19 *et seq.*

The Petitioner seriously questions Respondent's interpretation and application of *"United States* v. *Ringold"* 8 Peters 150 (Res. Brief, p. 23; discussed Petitioner's Brief, p. 19). The Respondent here attempts to detract from the broad language of that case by saying: "the defendant had the benefit of the specific statutory consent of the Government which permits setoffs of any kind whether or not related to the main suits," and for proof that the United States had given it "explicit consent" cites the Act of March 3, 1797, Sess. II, Ch XX. The statue, however, does not define the scope of counterclaims to be allowed against the United States. Only

through judicial construction was a broad, liberal counterclaim permitted under this statute.[1] It seems paradoxical that the United States does not have the immunity within its own courts now sought by The Republic of China here. The extent of immunity granted to the United States through its judiciary can properly be used as a criterion for the treatment of friendly sovereign litigants in our courts.

Throughout its brief (Res. Brief, pp. 12, 24, 41) Respondent contends that only Congress may restrict the immunity of a friendly foreign sovereign. But there has never been an act of Congress granting immunity to foreign sovereigns in the courts of this country. Such immunity as they enjoy derives from court decisions. In fact, the Respondent wholly relies upon such a decision as establishing sovereign immunity in this country (*Schooner Exchange* v. *McFadden*, 7 Cranch 116, Res. Brief, p. 17). Obviously this Court has the power to interpret its own decisions, and it has stated on more than one occasion that it has the authority to determine the question of sovereign immunity. *The Navemar*, 303 U. S. 68; *Ex Parte Peru*, 318 U. S. 578.

II. Respondent's Point IV: "The plea of sovereign immunity to the counterclaims is not in conflict with the suggested change in policy of the State Department to restrict the doctrine of sovereign immunity to activities connected with public or governmental acts. Furthermore, a shift in policy by the executive department cannot control the courts."

On page 36 of its brief Respondent says:

> "The doctrine of sovereign immunity is too deeply embedded in our law to be uprooted by judicial decision."

Upon close examination however the immunity of a friendly foreign sovereign is not "deeply embedded" in

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[1] *United States* v. *Wilkins*, 6 Wheat. 137, 144.

our law. The only field of law in which this Court has had occasion to deal with the subject of foreign sovereign litigants has been in admiralty. Since heretofore this Court has not had before it the problem of sovereign immunity in other aspects, it is proper to consider what the courts of other nations have done to define international law on this subject. As Chief Justice Marshall stated:

> ". . . This law [international law is meant] is in part unwritten, and in part conventional. To ascertain that which is unwritten, we resort to the great principles of reason and justice; but, as these principles will be differently understood by different nations under different circumstances, we consider them as being, in some degree, fixed and rendered stable by a series of judicial decisions. The decisions of the courts of every country, so far as they are founded upon a law common to every country, will be received, not as authority, but with respect. The decisions of the courts of every country show how the law of nations, in the given case, is understood in that country, and will be considered in adopting the rule which is to prevail in this." (*Thirty Hogsheads of Sugar* v. *Boyle*, 9 Cranch 191, 198 (1815).)

A survey of the judicial decisions of other nations, whether civil or common law, indicates that many have adopted the restrictive theory of sovereign immunity. And furthermore it is not the purpose for which the sovereign acts which is determinitive, but the nature of the act itself. The doctrine of restrictive sovereign immunity does not deprive the sovereign of its dignity or its sovereignty. When it is acting as only a sovereign government can act, it is immune. On the other hand, when it transacts business within the territory of another country, when it enters into commercial relations with foreign persons and corporations, when it voluntarily incurs money obligations, it is acting as any person or private corporation. When it is a debtor to an American corporation, it should be treated as such. The fact that the obligations are "Treasury notes" is but a way of defining the written evidence of the sovereign's debt.

Our own State Department, in formulating its policy, has pointed to the actions of foreign courts and in some of their decisions we find that a sovereign which has made a contract to purchase bullets for its army, shoe soles for its soldiers, or has borrowed money for any purpose whatever, was not granted immunity (Petitioner's main brief, pp. 37-42). The Respondent is clearly wrong in implying that, if the United States were to go abroad (Res. Brief, p. 24) and do business with foreign corporations, incur obligations, including the borrowing of money, it could plead and be protected by the plea of sovereign immunity in that country. Positively it could not in many of the courts of Europe. In most of them, if it submitted itself as a plaintiff, it would have to meet any available counterclaims (Pet. Brief, p. 8, Appendix B).

In 1952, when the State Department issued its policy statement, Mr. Tate said in his letter:

> "It is thus evident that, with the possible exception of the United Kingdom, little support has been found except on the part of the Soviet Union and its satellites for continued full acceptance of the absolute theory of sovereign immunity."

Since 1952 even Great Britain has started to abandon the absolute theory.[1] The English doctrine now appears to be in a state of flux. In 1952, an Interdepartmental Committee on State Immunities, appointed by the government, declared itself unable to establish the "exact position under international law" because of the great divergence in state practice.[2] In *Compagnia Naviera Vascon-*

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[1] In Great Britain as well it seems that the decisions of the higher courts almost all embraced vessel cases.

[2] Quoted from Michael Brandon, Sovereign Immunity of Government Owned Corporations and Ships, 39 Cornell Law Quarterly 425, 449. In England, a Certificate of the Foreign Office relates only "to questions of fact or status and not to law", stating "whether the foreign state, or entity is recognized by H. M. Government as being entitled to diplomatic status in England. The legal conclusions are drawn by the court".

gado v. *Cristina S. S.* (All. E. R. 19, 1938), the first case before the highest judicial body in England, immunity was granted to a vessel engaged in trade but owned by a foreign government. However, three of the Lords declared their disagreement. In *Sultan of Johore* v. *Abubakar* (All. E. R. 1261, P. C., 1952), the Privy Council took the opportunity to observe "that in the absence of distinguishing facts, the absolute immunity doctrine still applies as far as the Court of Appeals, but that the House of Lords has not yet pronounced on the matter."[1]

Regardless of whether Great Britain now follows the absolute or restrictive theory of sovereign immunity, it should be pointed out that the courts of Great Britain have long permitted broad counterclaims to be asserted against friendly foreign sovereigns. This is clearly demonstrated in *Strousberg* v. *Republic of Costa Rica* (Chancery Division Weekly Reporter Vol. XXIX, 1880-81 p. 125), where it is stated:

> ". . . It is a violation of the respect due to a foreign Sovereign or State to issue the process of our courts against such Sovereign or State. There is but one exception, if it can be called an exception, to the rule, and that is where foreign Sovereign or State comes into the courts of this country for the purpose of obtaining some remedy; then by way of defence to that proceeding, the person sued here may file a cross-claim against that Sovereign or State for enabling complete justice to be done between them. The defendant in that case is, in fact, only giving to the foreign Sovereign's attorney or solicitor notice of the proceedings—for that is, in substance, what it comes to—so as to bring in whatever defence or counter-claim there might be as a set-off. . . ."

Petitioner has consistently maintained that the counterclaims were erroneously dismissed without reference to either the absolute or restrictive theory of immunity.

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[1] Compare article by Michael Brandon, *supra*.

III. In reply to Respondent's Conclusion.

Respondent expresses a fear that if immunity is not granted in this case, the sovereign will be harassed by the assertion of defaulted notes as counterclaims whenever it comes into court. The suggestion that a bank might buy up defaulted notes is irrelevant here. There is complete privity between the parties. Furthermore these notes were purchased for full value.

Good faith and honor underlie every business relationship. It would be unfortunate if these fundamental concepts should have a special meaning when they apply to foreign sovereigns.

The Republic of China, as any other sovereign appearing as voluntary litigant in our courts, is amenable to the laws of the United States. If it enters these courts to collect a debt it is presumed that it seeks a just and equitable determination of the controversy between it and the institution it sues. But here it seeks an exemption from consideration by the court of circumstances which would defeat its claim. Thus, the Respondent seeks not a determination of the rights of the parties before it, but rather the recognition and enforcement of a vested interest in that "hoary doctrine" of absolute sovereign immunity.

Respectfully submitted,

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